No. 151

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES, ET AL., APPELLANTS

v.

GREAT NORTHERN RAILWAY COMPANY

MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION IN OPPOSITION TO PETITION FOR REHEARING

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In its petition for rehearing, the Great Northern Railway Company contends that the opinion of this Court leaves two material questions undecided; that the district court correctly decided these questions in petitioner's favor; and that review of the district court's decision on these points will not entail *de novo* examination of the administrative record, and should be undertaken by this Court.

We believe that the first question raised by petitioner rests upon an erroneous conception of the law as it is unequivocally declared in this Court's opinion. Petitioner's second question has *not* been answered by the district court. Moreover, in

our view, disposition of that question would require this Court to review the entire administrative record.

1. Petitioner points out (Pet., p. 3) that the district court held that the Commission had failed to find "that the existing apportionment of through charges has been, is, or will be unlawful in any respect."[1] This failure by the Commission, according to petitioner, requires affirmance of the district court's judgment. Under this Court's holding, however, a finding by the Commission that the former charges were unlawful was wholly unnecessary. This Court declared (Slip Op., p. 6):

> Under Section 15(3), the Commission is empowered to "establish through routes, joint classifications, and joint rates, fares, or charges." The only pertinent limitation to their establishment found in Section 15(3) itself is that the Commission deem such action "necessary or desirable in the public interest."

While the Court pointed out (Slip Op., p. 7) that "Section 15(4) conditions the powers granted the Commission in Section 15(3)", it went on to hold (*id.*, p. 11) that Section 15(4) does not touch the present case, but applies only where a new through route is being established. Consequently, for purposes of this case, the only finding required of the Commission, preliminary to establishing joint rates, was a finding that their establishment was

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[1] The old charges were not joint rates, but a combination of separately established rates.

"necessary or desirable in the public interest." The Commission made that finding in those words (R. 24).[2]

Notwithstanding this Court's statement that the power to establish joint rates must be determined by reference to Section 15(3), petitioner relies upon the first sentence in Section 15(6), which provides:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *.

That language is manifestly inapplicable here. The Commission could not have found in the present case that the existing "divisions of joint rates" were unlawful because, prior to the Commission's action in establishing joint rates, none existed. That Section 15(6), which declares the criteria to be followed in dividing joint rates, comes into play only after joint rates are initially established is in-

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[2] The evidence and subsidiary findings upon which the ultimate finding was based are discussed in the Government's brief on the merits at pages 14-18.

dicated with unmistakable clarity in this Court's opinion. The Court stated (Slip Op., pp. 6-7):

> *Once joint rates are lawfully established,* the Commission is authorized by Section 15(6) to prescribe "just, reasonable, and equitable divisions" of revenue between the participating carriers and to determine such divisions by giving due consideration to various listed factors, including "the amount of revenue required" by participating carriers. [Italics supplied.]

Petitioner's first question has already been decided by this Court, adversely to petitioner.

2. Petitioner further contends (Second Question, pp. 4-7) that the Commission's order prescribing divisions is erroneous as a matter of law, because (a) the Commission allegedly considered, for purposes of comparison, certain rates not part of the instant record,[3] and (b) the Commission allegedly failed to consider the financial needs of the Great Northern, as it was required to do by Section 15(6).

It should be noted at the outset that, contrary to petitioner's assertion, the district court did not pass upon either of these contentions. Indeed, there is no reference to them either in the court's findings (R. 596-603) or in its opinion (R. 592-595). While the district court held that there was insufficient competent evidence to support the result reached by the Commission, it did so on the

[3] The reference is to the appendix-10 scale of rates promulgated in the *Class Rate Investigation, 1939*, 262 I.C.C. 447, 766. See the Commission's opinion (R. 22) and order (R. 25).

premise that the Commission was required to exclude all evidence relating to financial need (R. 594). This Court has declared that premise to be incorrect.

In addition, it is clear that consideration of these contentions of petitioner would necessarily involve a weighing of the entire administrative record. We believe that the Commission used the rate scale to which it referred (R. 22, 25) as a convenient formula for expressing the divisions which it determined to be appropriate, rather than as evidence justifying the particular divisions ordered.[4] But even if petitioner is correct in its assertion that the Commission made an improper rate comparison and gave it some weight as evidence, it would still be necessary to determine whether the error was prejudicial. See Administrative Procedure Act, Section 10(e), 60 Stat. 243, 5 U.S.C. 1009(e). The admission of incompetent matter does not constitute reversible error, if there is substantial evidence in the record to sustain the agency's determination. *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Commission*, 18 F. 2d 866, 871 (C.A. 8), certiorari denied, 275 U.S. 533; *Sisto* v. *Civil Aeronautics Board*, 179 F. 2d 47, 51 (C.A. D.C.). To determine whether the supporting evidence is substantial, of course, requires examination of the whole record. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474.

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[4] See the Government's brief on the merits, p. 18, n. 19, and p. 42, n. 37.

Petitioner's assertion that the Commission considered only the financial needs of the Montana Western, ignoring those of the Great Northern, is incorrect. The Commission took account of the Great Northern's revenue needs by making detailed comparisons of the car-mile yield which Great Northern obtains from traffic generated by its own branch lines in adjacent areas with the yield it obtains on grain traffic originated by the Montana Western. The Commission found, upon the basis of this evidence, that under the divisions prescribed Great Northern would obtain a yield on traffic originated by Montana Western in substantial conformity with its earnings on the traffic generated by its own branches (R. 20-21, 23). Certainly, in the absence of a showing that the rates on its own, similarly situated branch lines were inadequate to meet its financial needs, the Commission was entitled to presume the contrary. The soundness of the presumption is confirmed by the fact that Great Northern has not claimed at any stage of the proceedings that its return under the divisions prescribed by the Commission will be less than compensatory.

As fully stated in the Government's brief on the merits (pp. 40-44), the Commission has considered the various factors which it was required by Section 15(6) to take into account. We believe further that the division formula which the Commission adopted has an entirely rational basis in the record. See Government's brief on the merits, pp. 9-18, 40-44. Petitioner apparently believes

that in certain particulars the findings have an inadequate evidentiary foundation. But whatever the merits of these contentions, they are of the precise kind which this Court has decided should be determined on remand.

CONCLUSION

For the foregoing reasons, the petition for rehearing should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission,

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